STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 16, 2007
v	No. 263214 Saginaw Circuit Court
MICHAEL ANTHONY BOOKER, Defendant-Appellant.	LC No. 04-024890-FC

Before: Murray, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

A jury convicted defendant of carjacking, MCL 750.529a, felon in possession of a firearm, MCL 750.224f, possession of a firearm during commission of a felony, MCL 750.227b(a), and carrying a concealed weapon, MCL 750.227. The court sentenced defendant as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 9 to 14 years for the carjacking conviction, 4 to 7 years for the felon in possession of a firearm conviction, 4 to 7 years for the CCW conviction, and two consecutive years for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant and another individual were taken into police custody within minutes of a home invasion and robbery. At that time, they were in possession of a vehicle registered to the complainant. A pistol was in the vehicle's glove compartment.

Defendant first argues that there was insufficient evidence to support his conviction for carjacking because the complainant's car keys and car were not taken from the complainant's presence. In reviewing a challenge to the sufficiency of the evidence, we must determine whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that the prosecution proved the essential elements of the crime beyond a reasonable doubt. *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003). Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The standard of review is deferential and, therefore, we draw all reasonable inferences and resolve credibility conflicts in favor of the jury verdict. *Id.*

To prove carjacking, the prosecution must establish (1) that the defendant took a motor vehicle from another person, (2) that the defendant did so in the presence of that person, a passenger, or any other person in lawful possession of the motor vehicle, and (3) that the

defendant did so either by force or violence, by threat of force or violence, or by putting another in fear. *People v Green*, 228 Mich App 684, 694; 580 NW2d 444 (1998). In interpreting the "presence" requirement in the carjacking statute, this Court adopted the definition of "presence" applied to the armed robbery, MCL 750.529, and unarmed robbery, MCL 750.530, statutes. *Green, supra* at 695. Thus, a thing is in the presence of a person if it is so within the person's "reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it." *Id.* "In other words, whether the taking of a motor vehicle occurs within the presence of a person, depends on the effect of violence or fear on that person's ability to control his possession of the motor vehicle at the time of its taking." *Id*.

The prosecution presented evidence that defendant and his companion violently restrained the complainant and that, if not restrained, the complainant could have kept control of his keys and thereby kept control of his car. Defendant's act of violently restraining the complainant allowed defendant and his companion to take the keys from the complainant and take his car. Were it not for defendant's violent actions, the complainant could have kept control of his keys and thereby kept control of his vehicle. Thus, the complainant's car was taken in his "presence," satisfying the second element of carjacking. The other two elements, the taking of the car itself and the use of force, violence, or threat of violence, were also clearly established by the police witnesses who testified to stopping defendant and seeing him as the driver and the complainant's testimony that defendant hit him and forcibly tied him up. The evidence was sufficient to support defendant's carjacking conviction.

Defendant next argues that the trial court erred by denying his motion for new trial because the carjacking conviction is against the great weight of the evidence. The test for whether a verdict is contrary to the great weight of the evidence "is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). A trial court's determination that the verdict was not against the great weight of the evidence is reviewed for an abuse of discretion. *People v Stiller*, 242 Mich App 38, 49; 617 NW2d 697 (2000).

Defendant's arguments regarding this issue hinge on attacking the complainant's credibility. However, "[c]onflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *Musser, supra* at 219, quoting *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). Rather, unless "directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Id*., quoting *Lemmon, supra* at 645-646 (citation omitted). The complainant testified that defendant and his companion physically assaulted him and then took his vehicle. The complainant's testimony that he was the victim of a carjacking was strongly supported by the testimony of police officers that defendant and his companion were stopped while driving the complainant's vehicle and that the complainant suffered injuries consistent with a physical assault and restraint. The complainant's testimony was not deprived of all probative value that the jury could not have believed it, nor did it contradict physical facts or realities. The trial court did not abuse its discretion by denying defendant's motion for new trial.

Defendant also argues that the prosecutor committed misconduct when he testified during his closing argument, tried to read from a document not in evidence during his closing argument, and tried to admit impermissible character evidence. We disagree.

"Generally, a claim of prosecutorial misconduct is a constitutional issue reviewed de novo." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Prosecutorial misconduct claims are reviewed on a case-by-case basis, looking at the prosecutor's comments in context and in light of the defense arguments and their relationship to evidence admitted at trial. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

Any impropriety in the prosecutor's comments during closing arguments with regard to the gun involved in this case and a 911 dispatch was cured when the trial court gave clear instructions to the jury explaining that what the attorneys say in a case is not evidence and that what the trial court has excluded as evidence should not be considered. Juries are presumed to follow their instructions. *People v Hana*, 447 Mich 325, 351; 524 NW2d 682 (1994).

And, even assuming that the prosecutor asked defendant about a previous breaking and entering conviction to show that defendant acted in conformity with a predisposition to commit a similar crime, it is apparent that the jury did not use this conviction as propensity evidence given that it acquitted defendant of the home invasion charge. Further, the jury presumptively disregarded the question because the trial court sustained defendant's objection to it. Cf. *Hana, supra* at 351. Thus, any misconduct by the prosecutor was cured by the relevant jury instructions.

Lastly, defendant argues that the trial court improperly considered findings not made by the jury beyond a reasonable doubt in scoring offense variable (OV) 1 and improperly scored him for two different sentencing guidelines variables for the same prior offense. We disagree.

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

First, "a defendant does not have a right to anything less than the maximum sentence authorized by the jury's verdict, and, therefore, judges may make certain factual findings to select a specific minimum sentence from within a defined range." *People v Drohan*, 475 Mich 140, 160, 164; 715 NW2d 778 (2006). "As long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *Id*. at 164. Thus, the trial court did not err when it made findings affecting only the sentencing guidelines score. The trial court properly scored points for OV 1 after finding that there was sufficient evidence to support a finding that defendant pointed a gun at the complainant.

The trial court also properly scored prior record variable (PRV) 2, prior low severity felony convictions, MCL 777.52, and PRV 6, MCL 777.56, offender's relationship to the criminal justice system (offender on bond awaiting adjudication of sentence), based on the same

prior offense. According to the plain language of MCL 777.52, points are scored for a prior low severity *conviction*. Sentencing is not required for a conviction. *People v Funk*, 321 Mich 617, 621; 33 NW2d 95 (1948). Because defendant was convicted of a low severity offense before the incident in this case, that conviction was properly scored under PRV 2. And because defendant was awaiting sentencing on that case when the present offense was committed, the trial court properly scored ten points for PRV 6 for committing the instant offense while awaiting sentencing. MCL 777.56(c). The trial court did not err in scoring points for PRV 2 and PRV 6 in relation to the same prior offense.

Affirmed.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens